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6 **UNITED STATES BANKRUPTCY COURT**
7 **DISTRICT OF ARIZONA**

8 In re:
9 NUTRACEA, a California corporation,
10 Debtor.

Chapter 11

2:09-bk-28817-CGC

**MOTION TO APPROVE BIDDING
PROCEDURES RELATING TO
DEBTOR'S MOTION FOR
AUTHORITY TO (1) SELL EQUINE
BRANDS AND ASSOCIATED
INVENTORY AND (2) ENTER INTO
SUPPLY AGREEMENT WITH MANNA
PRO PRODUCTS**

Hearing Date: TBD
Hearing Time: TBD
Hearing Room: 601

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18 Debtor hereby moves the court for the entry of an order approving certain bid procedures
19 and providing certain bid protections relating to the proposed sale of its Natural Glo, Satin Finish
20 and Max-E-Glo trademarks and related inventory free and clear of all liens, claims, and interests.
21 Contemporaneously herewith, Debtor is filing a motion to approve the sale (the "**Sale Motion**")
22 and requests that the court approve the bid procedures and related bid protections as detailed
23 below in advance of the hearing on that motion. This bid procedures motion is more fully set
24 forth and supported by the following Memorandum of Points and Authorities.
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1 with counsel for the official committee of unsecured creditors (the “**Committee**”)
2 throughout the Competitive Bidding Process. Any disagreement as to the
3 interpretation or application of the Bid Procedures will be submitted to and
4 resolved by the Court.

5 B. “As Is, Where Is”. The sale of the Purchased Assets, or any
6 portion thereof, will be on an “as is, where is” basis, without representation or
7 warranty, express or implied, of any kind, nature or description by Debtor, its
8 agents, or estate except, with respect to the Buyer, to the extent set forth in the
9 Agreement and, with respect to any other Successful Bidder (as defined below), to
10 the extent set forth in the relevant purchase agreement with such Successful
11 Bidder approved by the Court.

12 C. Free of Any and All Claims and Interests. Except to the extent
13 otherwise set forth in the relevant purchase agreement of the Successful Bidder or
14 ordered by the Court, all of Debtor’s right, title, and interest in and to the
15 Purchased Assets, or any portion thereof, will be sold free and clear of all pledges,
16 liens, security interests, encumbrances, claims (as claim is defined in Section
17 101(5) of the Bankruptcy Code), charges, options, and interests (collectively, the
18 “**Claims and Interests**”), pursuant to 11 U.S.C. §§ 363(b), (f) and (m), including,
19 without limitation, the liens, claims and interests described in the Sale Motion,
20 with all such Claims and Interests to attach to the net proceeds of the sale of the
21 Purchased Assets.

22 D. Participation Requirements. Unless otherwise ordered by the
23 court, or as otherwise determined by Debtor (in consultation with counsel for the
24 Committee), each person other than Buyer who wishes to participate in the
25 Competitive Bidding Process (each, a “**Potential Bidder**”), as a condition to

1 participating in the Competitive Bidding Process, must deliver to Debtor, Debtor's
2 counsel, and the Committee's counsel (collectively, the "**Notice Parties**");

3 i) Confidentiality Agreement. An executed
4 confidentiality agreement (to be delivered prior to the distribution of any
5 confidential information by Debtor to a Potential Bidder) that shall not be
6 on terms that, in Debtor's reasonable judgment, are more favorable to the
7 Potential Bidder than the confidentiality agreement executed by Buyer;

8 ii) Financing Commitment. Written evidence of a
9 firm, irrevocable commitment for financing and current financial
10 statements of the Potential Bidder (audited, if available), or, if the
11 Potential Bidder is an entity formed for the purpose of acquiring the
12 Purchased Assets, such financial statements of the equity holder(s) of the
13 Potential Bidder, or such other form of financial disclosure and credit-
14 quality support or enhancement that will allow Debtor and its financial
15 advisors, in consultation with the Committee, to make a reasonable
16 determination as to the Potential Bidder's financial and other capabilities
17 to consummate the transactions contemplated by the written proposal; and,

18 iii) Written Offer. A written proposal setting forth (a)
19 the purchase price, (b) any Purchased Assets expected to be excluded or
20 any additional assets desired to be included, (c) the structure of the
21 financing of the transactions contemplated by the proposal (including the
22 sources of the financing for the purchase price), (d) any anticipated
23 corporate, stockholder, internal or regulatory consents or approvals
24 required to close the transactions contemplated by the proposal, together
25 with the anticipated time frame and any anticipated impediments for
obtaining such consents or approvals, and, (e) any conditions to closing
that the Potential Bidder may wish to impose in addition to those set forth
in the Agreement.

iv) Qualified Bidders. A Potential Bidder that
substantially complies with the foregoing requirements, as determined by
Debtor in its reasonable business judgment, and whose financial
information demonstrates to Debtor's reasonable satisfaction (after
consultation with the Committee and Debtor's financial advisors) the
financial capability of the Potential Bidder to consummate the proposed
transactions, will be deemed a "**Qualified Bidder**." Notwithstanding the
foregoing, Debtor may request such additional information from a
Potential Bidder as necessary to evaluate the Potential Bidder's ability to
consummate the proposed transactions and to fulfill its obligations in
connection therewith, and such Potential Bidder shall be obligated to

1 provide such additional information as a precondition to becoming a
2 Qualified Bidder and participating in the Competitive Bidding Process.

3 v) Copies to Buyer. Debtor shall deliver to Buyer
4 copies of all proposals submitted by Potential Bidders within one (1)
5 business day after receipt thereof.

6 E. Due Diligence. No due diligence for anyone other than a Qualified
7 Bidder who has submitted a Qualified Bid (as defined below) will continue after
8 the Bid Deadline. Debtor will provide to Buyer prompt access to all due diligence
9 materials and other information provided to any Qualified Bidder that were not
10 previously made available to Buyer.

11 F. Bid Deadline. A Qualified Bidder that desires to make a bid will
12 deliver written copies of its bid to the Notice Parties in accordance with the notice
13 provision set forth above so as to be received no later than three (3) business days
14 prior to the hearing on the Sale Motion (the “**Bid Deadline**”). Debtor, after
15 consultation with the Committee, may extend the Bid Deadline once or
16 successively. Debtor will promptly notify Buyer and all Qualified Bidders of any
17 extension of the Bid Deadline.

18 H. Qualified Bid. A bid submitted will be considered a “**Qualified**
19 **Bid**” only if it is submitted by a Qualified Bidder in accordance with these
20 Bidding Procedures and complies with all of the following:

21 i) Irrevocable Bid. The bid must state that it is
22 irrevocable until the selection of the Successful Bidder; provided, that if
23 such Qualified Bidder is selected as the Successful Bidder, its offer will
24 remain irrevocable until the closing of the Sale to the Successful Bidder;

25 ii) Marked Agreement. The bid must include a duly
authorized and executed agreement proposed by such Qualified Bidder
(the “**Marked Agreement**”), including the purchase price of the
Purchased Assets expressed in U.S. Dollars (the “**Offered Purchase**
Price”), together with all exhibits and schedules thereto, as well as copies
of such materials marked to show those amendments and modifications to

1 the Agreement, which amendments and modifications shall, in Debtor's
2 reasonable business judgment, be no less favorable than the terms and
conditions set forth in the Agreement;

3 iii) Financial Ability. The bid must include written
4 evidence of a firm, irrevocable commitment for financing, or other
5 evidence of ability to consummate the proposed transaction, that will allow
6 Debtor (in consultation with the Committee) to make a reasonable
determination as to such Qualified Bidder's financial and other capabilities
to consummate the transactions contemplated by the Marked Agreement;

7 iv) No Due Diligence or Financing Contingency. The
8 bid must not be conditioned on the outcome of unperformed due diligence
by such Qualified Bidder or any financing contingency;

9 v) Higher and Better Offer. The bid must have a value
10 to Debtor, in Debtor's reasonable business judgment (after consultation
with its financial advisors and the Committee), that is greater than or equal
11 to the sum of (a) the Purchase Price (as defined in the Agreement), plus (b)
the amount of the Due Diligence Expense Reimbursement, plus (c)
12 \$10,000;

13 vi) Duly Authorized. The bid must include evidence, in
14 form and substance reasonably satisfactory to Debtor, of authorization and
approval from such Qualified Bidder's board of directors (or comparable
15 governing body) with respect to the submission, execution and delivery of,
and closing under, the Marked Agreement;

16 vii) Non-Refundable Deposit. The bid must be
17 accompanied by a good faith deposit in the form of a wire transfer (to a
bank account specified by Debtor or to Escrow Agent) in an amount equal
18 to \$50,000, that is non-refundable in the event of a default by the bidder;
and

19 viii) Timeliness. The bid must be received by the Bid
Deadline.

20 ix) Buyer/Agreement Deemed Qualified.
21 Notwithstanding the foregoing, Buyer will be deemed a Qualified Bidder,
22 and the Agreement will be deemed a Qualified Bid, for all purposes in
connection with the Competitive Bidding Process and the Sale.

23 I. Due Diligence Expense Reimbursement. Recognizing the value
24 and benefits that Buyer has provided to Debtor by entering into the Agreement, as
25 well as Buyer's expenditure of time, energy and resources, Debtor has agreed that

1 if Buyer is not the Successful Bidder, Debtor will, in the circumstances set forth in
2 the Agreement, pay to Buyer an amount equal to the lesser of: (i) its actual costs
3 and expenses incurred in connection with this Agreement, due diligence on the
4 Purchased Assets (including financial, tax, legal, operations, accounting,
5 employee, customer and valuation due diligence) and the transactions
6 contemplated by the Agreement, including, without limitation, attorneys' fees,
7 consulting fees and advisory fees, and (ii) Fifty Thousand Dollars (\$50,000),
8 payable in accordance with the terms of the Agreement, Bid Procedures Order and
9 Sale Order.

10 J. Competitive Bidding Process. Copies of all Qualified Bids will be
11 delivered to Buyer when they are determined to be Qualified Bids but no later
12 than two (2) calendar days prior to the hearing on the Sale Motion. At least one
13 (1) calendar day prior to the hearing on the Sale Motion, Debtor will provide
14 copies to Buyer and all other Qualified Bidders of the Qualified Bid which Debtor
15 believes, in its reasonable business judgment after consultation with the
16 Committee, is the highest or otherwise best offer (the "**Starting Bid**"). The
17 Competitive Bidding Process will run in accordance with the following
18 procedures:

19 i) No Unqualified Bids. Only Buyer and other
20 Qualified Bidders will be entitled to make bids during the Competitive
Bidding Process;

21 ii) No Collusion. Buyer and each other Qualified
22 Bidder will be required to confirm that it has not engaged in any collusion
with respect to the bidding or the Sale;

23 iii) Minimum Bid Increments. Bidding will begin with
24 the Starting Bid and continue, in one or more rounds of bidding, so long as
25 during each round at least one subsequent bid is submitted by a Qualified
Bidder that improves upon such Qualified Bidder's immediately prior
Qualified Bid, by an incremental value to the estate of at least \$10,000

1 over the prior bid (in each case net of the amount of any Due Diligence
2 Expense Reimbursement that would be payable if such Qualified Bid was
the Successful Bid);

3 iv) Credit Bid by Buyer. Buyer shall be entitled to
4 credit the amount of the Due Diligence Expense Reimbursement, i.e.,
\$50,000, in connection with making any subsequent bids during the
5 Competitive Bidding Process; and

6 v) Alternative Consideration. In the event that a
7 Qualified Bid contains non-cash consideration, the assumption of any debt
or liabilities of Debtor (other than to the extent already expressly set forth
8 in the Agreement), a proposal to pay any amounts to Debtor based on
future contingencies, or otherwise provide Debtor with any form of
9 consideration other than cash at closing (collectively, “**Alternative**
10 **Consideration**”), Debtor, in consultation with the Committee and
Debtor’s advisors, shall announce during the Competitive Bidding Process
11 what value Debtor reasonably believes any such Alternative Consideration
will have for purposes of determining the actual, present value of any such
bid.

12 vi) Supplemental Procedures. Notwithstanding any of
13 the foregoing, Debtor, after consultation with Debtor’s advisors, and the
Committee, may adopt such other rules for the Competitive Bidding
14 Processes as it reasonably anticipates will result in the highest or best
value for the estate and which are not inconsistent with any Bankruptcy
15 Court order, provided that such other rules are not inconsistent with the
Bid Procedures set forth above or the Bid Procedures Order entered by the
16 Court and are communicated to all participants during or prior to the
Competitive Bidding Process.

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18 K. Selection of Successful Bid. Prior to the conclusion of the
19 Competitive Bidding Process, Debtor, in consultation with the Committee, will (a)
20 review and evaluate each Qualified Bid and (b) identify the highest or otherwise
21 best offer for the Purchased Assets (the “**Successful Bid**” and the bidder(s)
22 making such bid, the “**Successful Bidder**”). Such determination will be final,
23 subject to approval by the Bankruptcy Court. In the event that Buyer is not the
24 Successful Bidder, Buyer may serve as back-up bidder at the original purchase
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1 price or such higher price as Buyer may designate on the record at the hearing on
2 the Motion.

3 6. The Bid Procedures will facilitate the orderly sale and assignment of the
4 Purchased Assets. The Debtor believes that the Bid Procedures are appropriate under Sections
5 105 and 363 of the Bankruptcy Code to ensure that the bidding process is fair and reasonable and
6 will yield the maximum value for its estate and creditors under the circumstances.

7 7. The Bid Procedures are designed to maximize the value received for the
8 Purchased Assets by facilitating a competitive bidding process in which all potential bidders are
9 encouraged to participate and submit competing bids. The Bid Procedures provide potential
10 bidders with sufficient notice and an opportunity to acquire the information necessary to submit a
11 timely and informed bid. At the same time, the Bid Procedures provide the Debtor with the
12 opportunity to consider all competing bids and, in consultation with the Committee, to select the
13 highest and best offer received.

14 8. Pursuant to Bankruptcy Rule 6004(f)(1), a sale of property outside the ordinary
15 course of business may be by private sale or by public auction. The Debtor believes that having
16 the ability to offer the Due Diligence Expense Reimbursement to the Buyer, and thereby
17 facilitate a Competitive Bidding Process, will maximize the realizable value of the Purchased
18 Assets for the benefit of the Debtor's estate, creditors and other parties in interest.

19 9. Under the terms of the Agreement, Buyer will be entitled to payment of the Due
20 Diligence Expense Reimbursement, as described above, if and only if, Debtor closes on the sale
21 of the Purchased Assets to another party who makes a higher and better offer, and provided that
22 Buyer is, at that time, ready, willing and able to perform under the Agreement. The amount to be
23 reimbursed is capped at \$50,000.

24 10. Debtor agreed to seek this court's approval of the Due Diligence Expense
25 Reimbursement in order to give Buyer an incentive to serve as stalking horse bidder and incur

1 the fees and costs associated with negotiating and documenting the Agreement, performing the
2 necessary due diligence, and participating in the bankruptcy sales process.

3 11. The Due Diligence Expense Reimbursement benefits Debtor and the estate by
4 inducing Buyer to serve as a stalking horse bidder. The stalking horse bid, as embodied by the
5 Agreement, sets a floor on the sales price the Debtor will receive and promotes competitive
6 bidding by giving others increased confidence in the value of the Purchased Assets as a result of
7 Buyer's due diligence. Without approval of the Due Diligence Expense Reimbursement, Buyer
8 would not have agreed to enter into the Agreement and become a stalking horse bidder. Without
9 the presence of a stalking horse bidder, competitive bidding on the Purchased Assets likely
10 would be materially reduced. The availability of the Due Diligence Expense Reimbursement,
11 therefore, is necessary in order to provide Buyer with some assurance that it will be compensated
12 for the time and expense it has spent (and may in the future spend) putting together its offer for
13 the Purchased Assets and the risk that arises from participating in the Competitive Bidding
14 Process as the stalking horse bidder.

15 12. Most of the case law on buyer protections of this sort focuses on so-called "break-
16 up fees", which are more onerous than Due Diligence Expense Reimbursements, in that they are
17 not limited to the actual expenses incurred by the stalking horse bidder. But even break-up fees
18 are recognized as a normal, and in many cases necessary, component of sales outside the
19 ordinary course of business under section 363 of the Bankruptcy Code. *See, e.g., Official*
20 *Committee of Subordinated Bondholders v. Integrated Resources, Inc.*, 147 B.R. 650
21 (S.D.N.Y.1992) (break-up fee may be necessary to convince a "white knight" to enter the
22 bidding by compensating it for the risk it is undertaking); *In re Fin. News Network, Inc.*, 126
23 B.R. 152 (S.D.N.Y. 1991), *appeal dismissed*, 931 F.2d 217 (2d Cir. 1991); *In re Crowthers*
24 *McCall Pattern, Inc.*, 114 B.R. 877, 879 (Bankr. S.D.N.Y. 1990) (break-up fees in merger
25

1 agreement approved); *In re 995 Fifth Ave. Assoc., L.P.*, 96 B.R. 24, 28-29 (Bankr. S.D.N.Y.
2 1989) (\$500,000 break-up fee not unreasonable absent evidence that it chilled bidding).

3 13. Bankruptcy courts regularly authorize expense reimbursement under the “business
4 judgment rule” which, essentially, prohibits second-guessing the actions of management taken in
5 good faith and in the exercise of sound business judgment. *Id.* at 52; *see also, Calpine Corp. v.*
6 *O’Brien Env’tl. Energy, Inc. (In re O’Brien Env’tl. Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999)
7 (break-up fee or expense reimbursement benefits the estate if it promotes competitive bidding or
8 induces stalking horse bidder to research value of assets and convert that value to a dollar figure
9 upon which others can rely).

10 14. To be approved, however, Debtor must demonstrate that the Due Diligence
11 Expense Reimbursement benefits the estate. *Calpine* at 533. Debtor submits that, without the
12 expense reimbursement, it would not have obtained the highest or best offer for the Purchased
13 Assets or the downside protection afforded by the stalking horse bid.

14 15. In the present case, the maximum reimbursement is approximately 7.69% of the
15 stalking horse bid. This is of the same order of magnitude as buyer protection fees approved in
16 other cases. *See, e.g., Consumer News & Business Channel P’ship v. Fin. News Network, Inc. (In*
17 *re Fin. News Network, Inc.)*, 980 F.2d 165, 167 (2d Cir. 1992) (break-up fee of 5.5% is fair); *LTV*
18 *Aerospace & Defense Co. v. Thomson-CSF, S.A. (In re Chateaugay Corp.)*, 1998 B.R. 848, 861
19 (S.D.N.Y. 1996) (enforcing reverse break-up fee of 4.4%).

20 16. Debtor believes that the Due Diligence Expense Reimbursement was necessary to
21 induce Buyer to play the role of stalking horse bidder and was essential to facilitate the sale and
22 assignment of the Purchased Assets in a timely manner.

23 17. In sum, Debtor submits that the Due Diligence Expense Reimbursement will not
24 chill bidding, is fair, reasonable and necessary under the circumstances, and provides a
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1 demonstrable benefit to the estate. Therefore, it meets the requirements of the business judgment
2 rule and Section 503(b) of the Bankruptcy Code.

3 **WHEREFORE**, for all the reasons set forth above, Debtor requests that the court
4 approve the Bid Procedures and Due Diligence Expense Reimbursement as set forth above and
5 otherwise contemplated by the Agreement and grant such other and further relief as may be
6 appropriate under the circumstances.

7 DATED this 17th day of March 2010.

8 FORRESTER & WORTH, PLLC

9
10 /s/ SCF (006342)

11 S. Cary Forrester
12 Attorneys for the Debtor

13 Copy e-mailed March 17, 2010 and/or
14 mailed March 18, 2010 to all those on
15 the attached service list:

16 /s/ Carrie Lawrence

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